

1995

# Two Challenges for Feminist Thought

Richard A. Epstein

Follow this and additional works at: [http://chicagounbound.uchicago.edu/journal\\_articles](http://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

## Recommended Citation

Richard A. Epstein, "Two Challenges for Feminist Thought," 18 Harvard Journal of Law and Public Policy 331 (1995).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# TWO CHALLENGES FOR FEMINIST THOUGHT

RICHARD A. EPSTEIN\*

Feminist theory comes in all varieties and shapes. Consider for example the differences that are observed between cultural and radical feminists. In the former ranks, it is possible to find repeated emphasis on the differences in observed psychology between men and women. Women speak, as Carol Gilligan's has claimed, "in a different voice" from men because they are more committed to the preservation and transmission of life, while men are more concerned with individual transcendence or social control.<sup>1</sup> Other cultural feminists are willing to acknowledge some role for biological influences in the creation and maintenance of social roles and legal order,<sup>2</sup> while still others claim that law may be an "irretrievably male" discipline because its stress on the separate identities of different human beings is more consistent with male temperament than with female temperament.<sup>3</sup> In sharp distinction radical feminists, such as Catharine McKinnon<sup>4</sup> and Andrea Dworkin<sup>5</sup> believe that all acts of sexual intercourse are best understood as assaultive attacks on women, and others have followed with the claim that pregnancy too should be treated in the same fashion.<sup>6</sup>

These differences in basic orientation carry over into the choice of political solutions that are sought. Some feminists stress the differences between the sexes and demand that some form of accommodation be made, whether in the larger political or constitutional order,<sup>7</sup> or in the workplace to reflect these differences.<sup>8</sup> Yet some feminists, like Sylvia Law, are far more

---

\* James Parker Hall Distinguished Service Professor of Law, The University of Chicago.

1. See Carol Gilligan, *In a Different Voice* 2, 105 (1985); see also Marilyn French, *Beyond Power* 482-83 (1985).

2. NEL NODDINGS, *CARING* 128 (1984).

3. Robin West, *Jurisprudence and Gender*, U. CHI. L. REV. 1, 1-2 (1988).

4. CATHERINE A. MCKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3-4 (1989).

5. ANDREA DWORKIN, *INTERCOURSE* 21-22 (1987).

6. SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 233-34 (1970).

7. See, e.g., Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 480-508 (1984); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543-44 (1986).

8. Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1139-40 (1986).

suspicious of the ostensibly benign accommodations that other feminists demand. She believes that an emphasis on the biological differences will obscure the important socially created distinctions of perhaps even greater importance, nonetheless, she shows some clear attachment to the traditional beliefs in individual autonomy.<sup>9</sup> Still other feminists, like Ruth Bader Ginsburg, opt strongly for sex-blind rules on both moral and constitutional grounds.<sup>10</sup>

The richness and diversity of feminist thought is, I think, a sign of its vitality. Any long and complete study of the different branches (strands understates the volume of the work) of feminist thought would require a detailed study not possible in a short essay. On this occasion, however, I shall not focus on disputes within the ranks of feminist thought. Rather, I take as my self-assigned task the obligation to raise some common challenges to all versions of feminist theory—challenges that they must meet if they are going to not only speak to those within the movement, but also to persuade those of us beyond the fold that feminism can contribute, as all useful theories must, to the understanding of human nature and social relations.

In order to raise these challenges, I shall focus on two broad classes of issues—one positive and the other normative—that should be of concern to all theorists, whether or not they fall within the feminist camp. The first and descriptive question concerns the issue of sex differences, their origins and their extent. Are these to be understood solely in cultural and social terms, or is there some irreducible biological component to behavior that helps shape the common forms of human interactions? The second and normative question addresses the linkage between our understanding of the nature of men and women, both in the singular and the plural, and our substantive beliefs about the correct choice of political philosophy and political institutions. Should one be some kind of libertarian at one extreme or some kind of socialist at the other? Or somewhere in between?

---

9. See, e.g. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 969 (1984). "The vision of equality advocated here suggests that the appropriate function of the law is not to enforce a general vision of what men and women are really like, but rather to respect each person's authority to define herself or himself, free from sex-defined legal constraints.")

10. See, e.g. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WOMEN'S RTS. L. REP. 361, 366 (1992). For judicial decisions, in which she successfully argued for her constitutional vision, see, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Craig v. Boren*, 429 U.S. 190 (1976).

This progression uses knowledge of the human condition, drawn largely from collateral disciplines outside the law, as the background for the more normative discussions that follow. Classical political philosophers such as Hobbes and Locke followed this very progression, beginning with individual psychology and moving outward to political organization.<sup>11</sup> While the terms of the debate have shifted in modern times, the more ambitious feminist thinkers must undertake this same comprehensive program.

## I. THE BIOLOGY OF SEX SIMILARITIES AND DIFFERENCES

The first question concerns the role of biology in understanding human relation. Most feminists rarely make any effort to rely on sociobiology for their descriptive work, even if they do criticize that mode of thought from time to time.<sup>12</sup> In this regard, there is a strong temptation to view any observed differences between males and females not as natural differences, but as "social constructs," without stopping to ask exactly who has done the constructing and what that person or group hopes to achieve. Feminism should confront much more explicitly the biological constraints on human behavior. Many distinguished biologists consider these constraints to be quite strong.<sup>13</sup> These constraints long antedate the arrival of human beings on the scene and manifest themselves whenever sex differences appear. Certainly these differences appear in striking fashion among the various primates that are not capable of reflective and conscious reorganiza-

---

11. See generally, THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Peter H. Nidditch ed., Clarendon Press 1975) (1690); JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* (1690), reprinted in *THE TRADITION OF FREEDOM: SELECTIONS FROM THE WRITERS WHO SHAPED TRADITIONAL CONCEPTS OF FREEDOM AND JUSTICE IN AMERICA 1* (Milton S. Mayer ed., Oceana Publications 1957) [hereinafter LOCKE, *SECOND TREATISE*].

12. See, e.g., Herma H. Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 74, 75 (Deborah L. Rhode ed., 1990) (stating that "sociobiologists use sexual difference as a natural evolutionary justification for continued female exploitation"); Sociobiology Study Group of Science for the People, *Sociobiology—Another Biological Determinism*, in *THE SOCIOBIOLOGY DEBATE* 280, 289-90 (Arthur L. Caplan ed., 1978) (arguing that ethnography, archaeology, and history all demonstrate that biology does not limit human social organization or the roles of the sexes within a society).

13. See, e.g., RICHARD DAWKINS, *THE SELFISH GENE* 152-76 (1976) (arguing that biology determines behavior); EDWARD O. WILSON, *ON HUMAN NATURE* 33, 133-34 (1979) (same).

tion of their social life.<sup>14</sup> Why then should they be absent in human beings?

Recall that the basic sociobiological theory postulates that the dominant drive is one of fitness for the individual, which is manifested by the extent to which he (or she) is able to pass on copies of his (or her) genes to the next generation.<sup>15</sup> Stating the proposition thusly makes it clear that individuals are not interested in their own individual well-being in some narrow egotistical sense. Such a short-sighted view cuts off any chance of evolutionary success before it begins. Instead, the idea of individual self-interest is meant to exclude only the idea that the individual acts for the benefit of a stranger, that is, an organism that has no, or only slight, genetic connection with that individual. But once the passing on of genes becomes the goal, then the well-being of offspring becomes essential for any biological creature, regardless of culture or circumstance. This goal, moreover, is identical for both males and females, but the strategies that they adopt to achieve it will differ because of their dissimilar biological endowments. There are thus both similarities and differences between males and females and the biological theory seeks to account for both.

It is useful to review the basic calculation that is captured in the idea of inclusive fitness. The principle states that each organism, including each human being, takes into account not only its own well-being, but also the well-being of offspring and kin, discounted by the want of any common relationship.<sup>16</sup> Thus, your children count "one-half of you." Therefore, in calculating the return to individual actions, their benefit counts one-half your own benefit; nieces and nephews (as children of siblings) count a quarter, and so on down the line. The basic task is to figure out how people investing their own private resources can generate an array of benefits not only for themselves, but also for persons with whom they have a genetic affinity. They are generous to the extent that they wish to benefit some limited class of others, but

---

14. See DANIEL G. FREEDMAN, HUMAN SOCIOBIOLOGY 27-43 (1979) (discussing sex-based roles in primate societies).

15. See DAVID P. BARASH, SOCIOBIOLOGY AND BEHAVIOR 23 (1982); DAWKINS, *supra* note 7; EDWARD O. WILSON, SOCIOBIOLOGY 156 (1980).

16. BARASH, *supra* note 9, at 43, 71-73; JEROME H. BARKOW, DARWIN, SEX, AND STATUS 50-53 (1989); W.D. Hamilton, *The Genetical Evolution of Social Behaviour*, I, 7 J. THEORETICAL BIOLOGY 1 (1964).

egotistical to the extent that they rate gains to themselves as higher than gains to the objects of their benevolence.

A simple example might help. If a particular action costs a person 100 and provides benefits of 250, he will take it whether the benefits go to himself or to his offspring, for he rates 125 (as half of 250) greater than the cost of 100. And by implication, he will take that action (lacking some better choice) no matter how the 250 units of benefit are distributed between himself and his offspring. Yet, if the benefits of this action are only 150, then the question of who benefits, and in what proportions, becomes crucial. The actor will not take the action if all benefits go to an offspring but will take it if at least one-third of the benefits go to himself. (Fifty plus one-half of 100 equals 100.) But he will not take that action if the benefits to himself fall below one-third. The same calculations work if "she" is substituted for "he" in all of the above calculations. So the similarities are there, and they are profound.

Nonetheless, this same theory explains why the differences in behavior between males and females are as fundamental and enduring as the differences between sperm and eggs. The basic implication is that different strategies for the investment in offspring will be adopted by males and females. On the one hand, any male can generate sperm by the billions, and of necessity the mature male has a very small investment in each sperm. The easy replication of sperm means it is possible to father many offspring simultaneously, so long as the mothers will provide care and nourishment during pregnancy and thereafter. The female strategy for investment differs because they have few eggs, and, in humans, can carry only one, or perhaps two, to maturity at any given time. They must invest very large resources in a single offspring. The key point is that asymmetries in behavior—sexual dimorphisms, as they are called in the trade<sup>17</sup>—are attributable to this universal sex difference, not only in human beings, but in all species that operate on this same basic pattern of sexual division.

Working through the theory shows that both males and females, if driven by the same level of self-interest, adopt different patterns of behavior to reflect their different biological endowments. One implication is that males are far more likely to en-

17. See generally BARASH, *supra* note 9, at 195, 228-31 & fig. 10.16 (discussing the effects of sexual dimorphisms on behavior); JOHN GRIBBIN & MARY GRIBBIN, *THE ONE PER CENT ADVANTAGE* 147-48 (1988) (same).

gane in rivalrous behavior than females, for the insemination of multiple females would substantially increase the number of one male's offspring.<sup>18</sup> Yet, for any one male to succeed, others have to be precluded. So success involves choosing high risk/high return strategies. Females have a lesser incentive to engage in such rivalrous behavior because the returns to fitness are far lower. For a female, the number of offspring is sharply limited by her carrying capacity. Mating with many males produces little additional gain, especially after fertilization takes place,<sup>19</sup> and may well produce some substantial loss, such as the substitution of an inferior male as father.

This difference in sexual strategies has strong behavioral implications in courtship. Males will take the initiative because they have less to lose. Females will play hard-to-get in order to have the male demonstrate some level of loyalty, which could prove critical in assisting the mother during pregnancy and helping with the offspring thereafter. Yet, once the offspring is conceived, the mother's tendency will be to try and keep the father loyal, and the father's tendency will be to wander. These instincts carry over into humans and shape the asymmetrical courtship patterns that tend to be observed whenever individuals are allowed to choose their own mates in the marriage market. It is the male who tends to take the initiative at the outset of the relationship and the female who has to decide whether to accept or reject. And since the behavior is so important to the role, we should expect that the psychology will be molded to follow self-interest: men and women are more comfortable in playing the roles that are congenial to their biological roles, and will find themselves uneasy with powerful social conventions that dictate a parity in social roles in courtship, marriage and parenting.

In addition to behavioral patterns, basic biological characteristics will be influenced as well. Consider the onset of puberty at different ages for males and females. Sociobiology supplies an explanation. The female's objective is to maximize her opportunities to carry offspring to term, and an early start is a good idea as long as the mother's health is not impaired by the burdens of

---

18. BARKOW, *supra* note 10, at 57-61; FREEDMAN, *supra* note 8, at 67-72; Robert L. Trivers, *Paternal Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN*, 1871-1971, at 136, 139-41 (Bernard Campbell ed., 1972).

19. BARKOW, *supra* note 10, at 57-61.

pregnancy.<sup>20</sup> But for males, early puberty could lead to a sexual attraction that in turn leads into conflict with other males who are larger and better able to win out in direct conflict.<sup>21</sup> So a delayed puberty keeps the young male out of harm's way until he is strong enough to have good chances at reproductive success.<sup>22</sup> These differences only operate at the margins, but they are important nonetheless. I know of no purely social theory that would explain this commonplace difference between the sexes, which in turn would help explain other practices that are equally commonplace, such as the general tendency for men to marry women who are younger than they are.<sup>23</sup>

The implications of the theory carry over into areas on which many feminists like to dwell. To give but one illustration, it is sometimes said in feminist theory that men are much more concerned with rights, and women are much more concerned with caring.<sup>24</sup> Based upon biology, there is some degree of truth in this notion, because in most instances, the female has the greater opportunity to influence the condition of the offspring for the better. If her costs are lower with respect to protection, we would expect that she would offer greater protection than a male who has a similar investment in the same offspring. Here the basic framework set out above continues to hold for both sexes. The key difference is that the lower cost of care suggests that, at the margin, the female will be able and willing to devote more of her own limited resources to the welfare of her children before she reaches that critical two-to-one ratio. And if the female devotes more time in dealing with offspring, then she will spend less time in dealing with strangers, that is, in dealing in transactions at arm's length, for which the vocabulary of rights is designed. The usual differences in sex roles should not be overstated, but by the same token they should not be ignored.

These behavioral differences, moreover, do not take place in a void. They clearly rest on a very complex web of interactions between human beings that depend on cues that are hard to identify in the abstract, but influence all sorts of prosaic human

20. BARASH, *supra* note 9, at 231; David M. Buss, *Sex Differences in Human Mate Selection Criteria: An Evolutionary Perspective*, in *SOCIOBIOLOGY AND PSYCHOLOGY* 335, 348-50 (Charles Crawford et al. eds., 1987).

21. BARASH, *supra* note 9, at 231.

22. *Id.*

23. See U.N. DEP'T OF INT'L ECONOMICS & SOCIAL AFFAIRS, *PATTERNS OF FIRST MARRIAGE* at 7-12, 17-18, 22-31, U.N. Doc. ST/ESA/SER.R/111 (1990).

24. See, e.g., GILLIGAN, *supra* note 1, at 17, 73, 100.



interactions. We now know that the actions of some hormones and neurotransmitters differ sharply between the sexes, and that these substances influence all kinds of behavior, often in powerful and dramatic ways.<sup>25</sup> It is one thing to argue their irrelevance as a matter of normative theory, but quite a different thing to postulate their irrelevance as a matter of descriptive theory. These silent chemicals are part of our biological endowments and we cannot act and speak as though they have no influence over social behavior, when clearly at some level they do.

The differences between men and women, then, are not simply matters of size, or even matters of size and strength—although these should never be ignored in any overview of the basics. They are also matters of psychology and behavior. The differences are not polar in any category. It would be foolish to say that all men are categorically different from all women. But by the same token, it would be irresponsible to claim that the shape of the distribution with respect to certain traits, its median, and its variance is the same for both males and females when it seems so clear that they are not.<sup>26</sup> The evidence on these matters seems to be accumulating, even to the point where it is said that women and men tend to give directions in different ways—women use landmarks, men use coordinates<sup>27</sup>—or interact with computers in fundamentally different ways—women as tools that

---

25. See Mitch Berman et al., *The Effects of Hormones, Type A Behavior Pattern, and Provocation on Aggression in Men*, 17 *MOTIVATION & EMOTION* 125, 135-37 (1993) (finding that males with higher endogenous testosterone levels displayed more aggressive behavior); Anke W. Ehrhardt & Susan W. Baker, *Fetal Androgens, Human Central Nervous System Differentiation, and Behavior Sex Differences*, in *SEX DIFFERENCES IN BEHAVIOR* 33, 47-50 (Richard C. Friedman et al. eds., 1974) (concluding that females with greater-than-average prenatal production of male sex hormone were more likely to display long-term tomboy behavior); Jeanette McGloves, *Sex Differences in Human Brain Asymmetry: A Critical Survey*, in *THE PSYCHOLOGY OF GENDER* 281 (Carol N. Jacklin ed., 1992) (finding that studies support the conclusion that the male brain is more symmetrically organized for both verbal and non-verbal functions); Anne C. Petersen, *Physical Androgyny and Cognitive Functioning in Adolescence*, 12 *DEV. PSYCHOL.* 524, 529-31 (1976) (concluding that males with lower levels of male hormones and females with higher levels of male hormones had greater spatial visualization abilities). See generally *PROGRESS IN BRAIN RESEARCH*, VOLUME 61: *SEX DIFFERENCES IN THE BRAIN* (G.J. de Vries et al. eds., 1984) (listing a collection of studies).

26. See, e.g., Janet S. Hyde, *How Large are Gender Differences in Aggression? A Developmental Meta-Analysis*, in *THE PSYCHOLOGY OF GENDER*, *supra* note 19, at 265, 273-75 (finding that, while aggression differences are fairly reliable across studies, they are not large); *Just How the Sexes Differ*, *NEWSWEEK*, May 18, 1991, at 72, 83 (noting that average differences within a sex exceeds average differences between sexes); see also HILARY M. LIPO, *SEX & GENDER* 105-21, 131-49 (1993) (providing a survey of the studies to date); ROBERT E. POOL, *EVE'S RIB* (1994) (same).

27. Diane McGuinness & Janet Sparks, *Sex Differences in Representations of a Familiar Terrain*, 7(2) *J. MENTAL IMAGERY* 91, 99-100 (1983).

should work, men as objects of play.<sup>28</sup> Perhaps some bits of this information are overstated for dramatic effect, but as the evidence accumulates, it all seems to run in the same direction. There are important and enduring differences in the behavior and psychology of males and females that must be understood before they are either praised or blamed. Our task is to see how the sociobiology can be added to the tool kit used to evaluate and understand human conduct.

## II. NORMATIVE IMPLICATIONS

The accumulation of biological information about males and females has important normative implications for the study of human behavior and human institutions. But in order to see these connections, we must proceed with some care. One fallacy that must be avoided is the assertion that there must be some necessary connection between the natural and the good. There is no such necessary connection. There are all sorts of instincts for which people have strong biological instincts: there are people who like to beat up their rivals, to lie, and to cheat.<sup>29</sup> Indeed, it is precisely because these instincts are so natural and inbred that they are so hard to eradicate. Our evolutionary inheritance is what we have for better or for ill, but no one could say that it ideally equips us for life within the social setting.

The question still remains, however, as to what framework will tell us which types of natural instincts should be honored, and which should be suppressed. My own view is that the question should be answered by looking to see what forms of human behavior advance overall social welfare. In that inquiry, the distinction between force and fraud on the one hand, and voluntary contract on the other must play a central role. The former result in negative sum games in which the winnings to one side are smaller than the losses to the other. The more those games are played the greater the total losses, and the more likely that each individual will lose on net to the depredations of others. It is for that reason that the classical social contract theory stressed the

---

28. Marlane E. Lockheed, *Women, Girls, and Computers: A First Look at the Evidence*, 13 *SEX ROLES* 115, 118-21 (1985).

29. See Charles F. Bond & Michael Robinson, *The Evolution of Deception*, 12 *J. NONVERBAL BEHAV.* 295, 301-05 (1988) (discussing the hereditary component of human deceptiveness); Irenaus Eibl-Eibesfeldt, *Evolution of Destructive Behavior*, 3 *AGGRESSIVE BEHAV.* 127, 135 (1977) (noting that observations of children born deaf and blind found patterns of aggressive behavior despite lack of opportunity to observe such behavior).

mutual renunciation of force as a key to ordered liberty in society.<sup>30</sup> And for whatever it is worth, the power of this prohibition surely hits harder on men than it does on women, given their differences in natural strength and aggression. Yet it is fully justified given the overall gains it generates, for men as well as women, even if not in perfectly even proportions.

Yet if force and fraud are dangerous to aggregate human well-being, then voluntary arrangements, including those in marriage and within the family, have the exact opposite consequence. They increase the welfare of all the parties to them, for people enter into agreements only when they gain more than they lose. To be sure, one has to be careful that force and fraud do not contaminate these agreements. Yet by the same token, we cannot interpret a powerful need for entering into a contractual arrangement as evidence that a contract was procured by force or fraud. There are genuine human needs, born of scarcity, on both sides of any transaction. Society must police the category of voluntary interactions, but by the same token these interactions should be fostered by the laws that secure their enforcement even in the face of *ex post* reluctance or regret. The more voluntary interactions we have, the more likely it is that their benefits will be widely distributed across all individuals, again within marriage and family.

The basic biological theory is important in this connection because it gives some broad and useful clues as to the direction these interactions will take. All too often it is assumed that the only just set of interactions are those which have men and women in positions of parity and identity throughout society.<sup>31</sup> The elimination or the suppression of sex roles is regarded as an objective of the sound society, and the evident differences in sex roles in virtually all societies, including our own, is treated as a sign that something is very much amiss. But if the descriptive truths about male/female differences hold, then we should not respond to the specialization of sex roles with a suspicion that often rises to the level of bitter denunciation. If individuals do have different natural endowments, then the system of voluntary arrangement should reflect those differences. The specialization

---

30. See LOCKE, *SECOND TREATISE*; *supra* note 5, at 4-7, 27-29; JEAN JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 48-49, 52-54 (Roger D. Masters ed. & Judith R. Masters trans., St. Martin's Press 1978) (1762).

31. See, e.g., MACKINNON, *THEORY OF STATE*, *supra* note 2, at 242-49 (arguing that any difference in position is due to male domination).

allows an increase in gains within family and marriage that can be shared by both parties. It should be a source of social satisfaction, not the object of social denunciation.

It is in this connection that I find the broad scale feminist denunciation of existing patterns of male/female interactions so puzzling. But denunciations there often are. One of the constant charges made is that these interactions are wholly arbitrary and conventional.<sup>32</sup> A second charge is in tension with the first: far from being just arbitrary and conventional, male/female interactions are the product of domination, exploitation and subordination.<sup>33</sup> I think that both of these charges are overblown, and largely false. Let me address each of them briefly.

One way to address the question of whether the social arrangements within the family are arbitrary and conventional is to ask what would happen if they were organized otherwise. In order to do that, it is useful to imagine a situation in which a mother, the moment after childbirth, took up her hunting implements and sallied forth into the woods, leaving the newborn infant in the care of its father.<sup>34</sup> Now compare the success of this society with one which followed the more conventional arrangements whereby the mother stayed close to the child and the father went out on the hunting expedition. There is little question that the first society would find itself pressed against the hard edge of survival: the mother would be less good, and fit, for her task, and so too the father. The output that they could generate would be far less than under the conventional arrangement, which in my view is far from arbitrary. It works to the mutual advantage and ultimate survival of all members of the family. It is far from a simple historical curiosity that no early society reversed the sex roles and organized itself in ways that gave men the dominant responsibility for child rearing and women the dominant responsibility for hunting and defense. The price of these social experiments would be too high in an age where every calorie of energy had to

32. See Martha Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL. 349 (1995).

33. See, e.g., Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 32-45 (1987) (arguing that dominance over women was achieved by force and perpetuated by construction of social perception); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-16, 1063-66 (1986) (rejecting policies, even if facially neutral, that perpetuate historical subordination of women).

34. Staying in the fields with the child may be grueling work, but it avoids the separation that the hunting example suggests.

be preserved. The result would be death by exhaustion or extermination.

It is therefore of especial irony to note that it is only with modern technology that we find it possible to relax the traditional sex roles within the family. The very sharp degrees of specialization that were necessary for survival in primitive cultures are no longer matters of life and death today. The expansion of the resource base makes it possible to use machinery for much of the drudge work at home and to allow women, if they so choose, to enter the workplace. But even though the patterns of child rearing have changed, as well they might, we should not forget the powerful biological influences on men and women. Husbands and wives, by and large, still assume differential roles with respect to parenting even though these are not the same roles that one found in the Stone Age.<sup>35</sup> Women are more likely to want to take a break in their careers than men, even if it means that some long term prospects for professional advancement are dimmed.<sup>36</sup> But there is little reason here for social concern, for it allows family arrangements to adapt to changes in technology and education for the benefit of men and women alike.

If this analysis is correct, then not only is it wrong to speak of dominant social arrangements as arbitrary and conventional, but it is equally wrong to speak of these arrangements as though they are solely the product of domination, exploitation, and subordination.<sup>37</sup> We do not have to hew faithfully to the image of the husband as the "good provider" and the wife as the "good homemaker" in order to see how these relations have evolved over time. It is enough to indicate that the specialization of roles within marriage that allow both husbands and wives to use their talents to the fullest should not be regarded as an exploitive arrangement. In particular, if the division of labor within marriage

---

35. See Jean W. Atkinson & Ted L. Huston, *Sex Role Orientation and Division of Labor in Early Marriage*, 46 J. PERSONALITY AND SOC. PSYCHOL. 330, 341-44 (1984) (noting that the shift of women into the work force has not been accompanied by a similar increase in men's performance of traditional female tasks at home); Michele Hoffnung, *Motherhood: Contemporary Conflict for Women*, in WOMEN 157, 162-65 (Jo Freedman ed., 1989) (noting that, even when both spouses work, women perform a substantially greater amount of childrearing activities); John P. Robinson et al., *Sex-Role Differences in Time Use*, 3 SEX ROLES 443, 456-57 (1977) (concluding that women continue to perform greater amounts of traditional female tasks at home partly due to reluctance to give up this area of control).

36. Jennie Farley, *Worklife Problems for Both Women and Men*, in SEXUALITY IN ORGANIZATIONS 29, 30-33 (Dail A. Neugarten & Jay M. Shafritz eds., 1980).

37. See, e.g., MACKINNON, *supra* note 27, at 32-45; Colker, *supra* note 27.

expands the total amount of a couple's production, then so much the better. An insistence on identity of roles and tasks within marriage would require each party to do tasks that the other can do better, and to eliminate the gains that come from specialization of task and function. We should not accept without a great deal of proof any world view that regards any voluntary transactions between the sexes as at best a zero sum game in which women at best lose no more than men gain. That amounts to a very grim view of human arrangements, for we could rarely, if ever, obtain a Kaldor-Hicks world in which the gains to the winners (men) are greater than the losses to the losers (women). We certainly would remain far from a Pareto-optimal world in which both sides to the transaction are better off.<sup>38</sup>

The biological postulates about self-interest yield, for once, far more upbeat conclusions: contracts and social arrangements that take place between men and women have the same desirable consequences as contracts between men and men or women and women. From the *ex ante* perspective, both sides to the deal are better off. Of course, some transactions will turn out sour as conditions and desires change, but this is hardly a reason to ban private agreements any more than we should cease all forms of regulation because some of them misfire on occasion. The focal point of the discussion has to be on the anticipated effects, which turn out to be the actual effects on most occasions. On this score, the implications of this mutual gain model are quite different from those of the exploitation model which too many feminists champion.

One testing ground for this theory deals with the distribution of gains and losses inside marriage. On this question, I think that the best article in recent years is a 1987 paper by Lloyd Cohen. Its title is, "Marriage, Divorce, and Quasi Rents; or 'I Gave Him the Best Years of My Life.'" <sup>39</sup> The title is designed first to deaden, and then to stimulate, all your romantic interest in the subject. Cohen's task in this paper is, however, a serious one. He begins with the obvious point that during courtship there is lots of room to choose an available mate, so that there is a competitive market of sorts in which couples then pair off. But once the marriage is made, and then goes sour, divorce takes place under

---

38. See Gary Lawson, *Feminist Legal Theories*, 18 HARV. J.L. & PUB. POL. 325 (1994).

39. Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or "I Gave Him the Best Years of My Life"*, 16 J. LEGAL STUD. 267 (1987).

radically different market conditions, namely, bilateral monopoly: the wife may only divorce her husband, and vice versa.<sup>40</sup> The terms and conditions under which the divorce takes place are highly influenced by the legal rules of the game. If the consent of both parties is needed, then one side can hold out for a lion's share of the game. If divorce is granted on the application of one party over the objection of the other, then the critical question concerns rules that shape the division of marital assets.

In choosing the ideal rules, the feminist critics are often correct when they note that husbands are in a position to exploit their wives unless legal protection is given. But the critics should not forget that much of that difference stems from the different biological clocks for men and women. A woman's contributions to a marriage are often greatest in its earliest years, when her reproductive capacities are at their highest. In the traditional marriage, moreover, she spent a good deal of her time and effort working at home and on the job so that her husband could obtain professional training that translates into a higher income for the couple.<sup>41</sup> To allow the husband simply to walk away from the marriage allows him to convert his wife's labor to his own advantage without compensating her for what she has sacrificed by contributing to his future earnings potential and well-being.

In light of these behavior patterns, the risk of exploitation is present in marital arrangements, even under the fairly rigorous definition used in law and economics, which equates risk of exploitation with the ability to exploit a monopoly position under the applicable legal rules.<sup>42</sup> Here the exploitation can come in two forms. First, the husband can extract most of the gains from the marriage, even if the wife is better off than she would have been if the marriage had never taken place. Second, it may well be that the conversion of the wife's labor upon divorce leaves her worse off than she would have been if she had not married him in the first place. The general lesson from this analysis is that using standard conceptions of law and economics does not necessarily protect what might be called the "male" point of view, and suggests that upon divorce the wife should have some sort of claim that represents her investment in his future human capital.

---

40. *Id.* at 299-303.

41. *Id.* at 284-95. See also GARY S. BECKER, A TREATISE ON THE FAMILY 119 (enlarged ed., 1991) (giving reasons for earlier marriage of females).

42. RICHARD A. POSNER, ANTITRUST LAW 8-18 (1976).

Divorce is, of course, an exceptional transaction, far removed from the usual market transactions of borrowing money, getting jobs, and buying houses. The harder question for many feminists is what legal position they should adopt if the complexities of the bilateral monopoly do not have to be negotiated in a particular case. If one is correct about the basic self-interest assumptions that spring from the social biology, the pointed question is why are not all feminists libertarians, as the older, nearly quaint phrase, "women's liberation," suggests. At one time, there was a strong connection between feminism and libertarian thought. John Stuart Mill was an ardent supporter of women's causes in the nineteenth century, and it is no accident that he was also the author of *On Liberty*, in which he took the sensible position that the only warrant for the use of state power was to prevent the harm that one individual could cause to another.<sup>43</sup>

Here it is sufficient to note that the early feminist efforts were all concerned with claims for full civil capacity—the right to vote, to enter contracts, to hold property on the same terms and conditions as men. The early feminist efforts to win the vote for women certainly fall within the aspirations for equal citizenship that all libertarians share,<sup>44</sup> but they speak to a very different goal than one which insists that women be represented in popular assemblies in proportion to their numbers. Likewise, the demand for full equality with men in the ability to make contracts, enter professions, and hold property goes to the very heart of the libertarian program. And the power of these ideals is well shown by

---

43. I like the passage so much that I shall quote it in full, and ignore some of the difficulties in its application:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.

John Stuart Mill, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 85, 95-96 (Everyman's Library ed. 1951) (1st ed. 1863).

On Mill's feminist sympathies generally, see JOHN STUART MILL & HARRIET TAYLOR MILL, *ESSAYS ON SEX EQUALITY* (Alice S. Rossi ed., 1970); John Stuart Mill, *The Subjection of Women*, in *THREE ESSAYS* 427 (The World's Classics ed. 1966) (London, The World's Classics ed. 1912).

44. See generally STEVEN M. BUECHLER, *WOMEN'S MOVEMENTS IN THE UNITED STATES* 89-106 (1990) (providing a detailed history of the women's suffrage movement).



the number of times that feminists quote from the Supreme Court's now infamous decision in *Bradwell v. Illinois*,<sup>45</sup> sustaining Illinois law that prohibited women from entering the practice of law. This decision rested heavily on the biological differences between the sexes. Yet, what is critical about that decision is that it places formal restrictions against the capacity to enter into certain professions, and was justified on the same grounds that limited the freedom of women to contract during marriage. It is the antithesis of a libertarian position, and it should be rejected even by those who think that the biological differences between the sexes do make a difference in their occupational preferences—there is no reason to foreordain that result, for, if the differences do matter, then they will be reflected by the patterns of employment that emerge once the legal barriers to entry are struck down.

The battles of this century, and the next, are far removed from the issue decided in *Bradwell*. Today, legal rules are likely to misfire in quite a different fashion. We are far more likely to make an error that is the mirror image of that in *Bradwell*, namely, to perceive any differences in the practice patterns or income of men and women lawyers or other professionals as evidence of sexism and patriarchy. What is needed from feminists is an insistence on universal liberty, not some narrow or particularistic advantage to women (or at least some women) regardless of its overall consequences to society. What is needed is a willingness to expand opportunities for all individuals, not some blind insistence on identity in outcomes in the marketplace for men and

---

45. 83 U.S. (16 Wall.) 130, 141 (1872). The strongest language reads as follows:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman has no legal existence separate from her husband, who was regarded as her head and representative in the social state. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

*Id.* at 141-42 (Bradley, J., concurring in the judgment).

for women. We need to rekindle our awareness of the great dangers of government coercion, and, armed with that knowledge, limit the causes for which we are prepared to invoke government power on our side of particular disputes.<sup>46</sup> Yet those developments are not likely to take place if we assume that equality of rights for women and for men requires an identity of social functions for women and for men. If the biological learning shows both differences and similarities in male and female behavior, we act at our collective peril if we ignore half of its teaching in working to fashion the social institutions that will surely endure into the next millennium.

---

46. For arguments supporting heavy use of government power, see MacKinnon, *THEORY OF STATE*, *supra* note 2 (arguing that state control is necessary to reverse male dominance); Zillah Eisenstein, *Constructing a Theory of Capital Patriarchy and Social Feminism*, in *WOMEN, CLASS AND FEMINIST IMAGINATION* 114, 114-15, 135-40 (Karen V. Hansen & Ilene J. Philipson eds., 1990) (arguing that a capitalist class structure and male supremacy are mutually dependent). See generally *WOMEN AND REVOLUTION* (Lydia Sargent ed., 1981) (containing a collection of essays regarding the relationship between Marxism and feminism).

